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3 **UNITED STATES DISTRICT COURT**
4 **SOUTHERN DISTRICT OF CALIFORNIA**
5

6 FIDELITY & GUARANTY LIFE
7 INSURANCE CO., a Maryland insurance
8 company,

9 Plaintiff,

10 v.

11 JAMES ALBERTSON, an individual,

12 Defendant.

13 JAMES O. ALBERTSON,

14 Cross-Complainant,

15 v.

16 OLD MUTUAL FINANCIAL NETWORK
17 F/K/A/ FIDELITY AND GUARANTY LIFE
18 INSURANCE CO. AND DOES 1-10,

19 Cross-Defendant.

CASE NO. 07cv00045 BTM(LSP)

**ORDER GRANTING MOTION TO
DISMISS THIRD, FOURTH, AND
FIFTH CLAIMS FOR RELIEF OF
THE CROSS-COMPLAINT**

20 Fidelity & Guaranty Life Insurance Co. ("Fidelity") has filed a motion to dismiss the
21 third, fourth, and fifth claims for relief in the Cross-Complaint filed by James O. Albertson
22 ("Albertson"). For the reasons discussed below, Fidelity's motion is **GRANTED**.

23 **I. BACKGROUND**

24 This action arises out of a dispute between Albertson and Fidelity over life insurance
25 proceeds. Albertson was the named beneficiary on a life insurance policy between Fidelity
26 and Luis Plascencia ("Plascencia"), who is now deceased. According to Fidelity, Plascencia
27 made material misrepresentations regarding his medical history and criminal record on his
28 application for the policy. Fidelity contends that it would not have issued the life insurance

1 policy had Plascencia been truthful on the application. In its Complaint, Fidelity seeks
 2 declaratory relief and rescission of the insurance contract under a two-year contestability
 3 clause.

4 Albertson filed a Cross-Complaint. In the Cross-Complaint, Albertson alleges, *inter*
 5 *alia*, that Plascencia was non-fluent in English and was functionally illiterate and, therefore,
 6 was incapable of making any material misrepresentations. (Cross-Compl. ¶ 9.) Albertson
 7 further alleges that F&G's agent, not Plascentica, completed the insurance application.
 8 Albertson asserts the following five claims for relief: (1) breach of contract; (2) breach of the
 9 implied covenant of good faith and fair dealing; (3) waiver; (4) estoppel; and (5) reformation.

10 11 II. DISCUSSION

12 Fidelity moves to dismiss Albertson's third, fourth, and fifth claims for relief. The Court
 13 grants Fidelity's motion in its entirety.

14 Albertson's third and fourth claims for "waiver" and "estoppel" are affirmative defenses,
 15 not causes of action. See Fed. R. Civ. P. 8(c). See also Continental Airlines, Inc. v. Intra
 16 Brokers, Inc., 24 F.3d 1099, 1103 (9th Cir. 1994) ("Estoppel is an affirmative defense, for
 17 which the defendant bears the burden of proof"); Intel Corp. v. Hartford Accident & Indemnity
 18 Co., 952 F.2d 1551, 1559 (9th Cir. 1991) (explaining that waiver is an affirmative defense).
 19 Albertson has already asserted an affirmative defense of waiver (Third Defense). Therefore,
 20 the cross-claim for waiver shall be dismissed. The Court shall treat the estoppel claim as an
 21 additional affirmative defense. See Fed. R. Civ. P. 8(c).

22 Albertson's fifth claim for relief is dismissed because the facts alleged do not support
 23 a claim for reformation. California Civil Code § 3399 provides that a contract may be revised
 24 "[w]hen, through fraud or a mutual mistake of the parties, or a mistake of one party, which
 25 the other at the time knew or suspected, a written contract does not truly express the
 26 intention of the parties" The purpose of reformation is to make a contract express the
 27 *true single intention* of the parties. American Home Ins. Co. v. Travelers Indemnity Co., 122
 28 Cal. App. 3d 951, 963 (1981). "Although a court of equity may revise a written instrument

1 to make it conform to the real agreement, it has no power to make a new contract for the
2 parties, whether the mistake be mutual or unilateral.” Id. (quoting Shupe v. Nelson, 254 Cal.
3 App. 2d 693, 700 (1967)).

4 According to Albertson, due to Plascencia’s inability to communicate in English and
5 Fidelity’s failure to make further inquiries, the application did not include the information
6 regarding Plascencia’s medical and criminal history. Albertson asks the Court to “correctly
7 answer the questions in the application and adjust the policy L0168467 premium/benefit
8 payment ratio in accordance with equitable principles.” (Opposition at 14.)

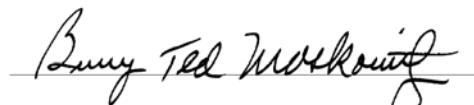
9 However, under the facts alleged by Albertson, there never was a “single intention”
10 or “real agreement” to insure Plascencia at a lower death benefit and/or higher premium in
11 light of his medical and criminal history. Whether Fidelity should have known that Plascencia
12 could not communicate in English and/or should have conducted a further investigation, the
13 fact remains that Fidelity did not know about Plascencia’s medical and criminal history. Any
14 misconduct on the part of Fidelity with respect to the failure to conduct further inquiries may
15 entitle Albertson to some form of equitable relief but does not support a claim for reformation.
16 The Court cannot write a new life insurance policy for the benefit of Albertson. Accordingly,
17 Albertson’s cross-claim for reformation is dismissed.

18
19 **CONCLUSION**

20 For the reasons discussed above, Fidelity’s motion to dismiss is **GRANTED**. The
21 third, fourth, and fifth claims for relief in the Cross-Complaint are **DISMISSED** for failure to
22 state a claim. The fourth claim for estoppel shall be redesignated as an additional affirmative
23 defense.

24 **IT IS SO ORDERED.**

25 DATED: November 26, 2007

26 

27 Honorable Barry Ted Moskowitz
28 United States District Judge